

**UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, NW
WASHINGTON, DC 20001-8002**

Date: 10/02/96

Case No. 95-INA-31

In the Matter of:

Afana Printing,
Employer,

on behalf of

Helen Abifan Tabash
Alien.

Before: Guill, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(C).

Statement of the Case

On February 22, 1993, Afana Printing, Employer, filed an application for alien employment certification to enable Helen Abifan Tabash, Alien, to fill the position of Off-set Letter Press Operator. The duties of the job were described as follows:

Will prepare and operate off-set printing press and will examine job order to determine quantity to be printed, stock specifications, colors and special printing

instructions.

Employer required that applicants have two years of experience in the job offered. (AF. 16)

The CO issued a Notice of Findings (NOF) proposing to deny certification on January 31, 1994. (AF. 10-14) The CO stated that Employer had not recruited U.S. workers in good faith. The CO also stated that Employer had submitted inadequate documentation of applicant contacts and that it did not appear that Employer had sent letters to applicants by certified mail. The CO also stated that Employer had failed to contact U.S. applicant Eric Purvis. The CO further stated that Employer had rejected a qualified U.S. applicant, Patricia Bailey, for other than lawful job-related reasons.

Employer submitted rebuttal dated March 3, 1994. (AF. 7) He stated that his secretary mailed the letters at the post office using a certificate of mailing which was signed by the postmaster. He further stated that all applicants were interviewed, including Eric Purvis; that Mr. Purvis lost his application, returned to Employer for another application and subsequently never called or showed further interest in the job. As to Ms. Bailey, Employer stated that she may have misunderstood his response to her question about the wage Employer will pay. He told her that "previous to that time he used to pay approximately \$8.00 per hour but that in order to find the worker that he desperately wants he is willing to pay more just to accomplish the desired result which is to find a qualified and a motivated worker. ...When the applicant told employer that she wanted a higher salary, the employer told her that he could not afford a higher one than what he offered. The rate of what a higher one meant was never discussed." (AF. 7)

The CO issued a Final Determination denying certification on March 14, 1994. (AF. 2-6) The CO stated that Employer's rebuttal did not establish that the applicants had been contacted by mail; that the undated certificate of mailing does not establish that Employer's letters were received by the applicants or when the letters were mailed. The CO also stated that it was unlikely that the postmaster would have signed the certificate without postmarking it.

The CO also found that Employer's rebuttal failed to document that it rejected applicant Bailey for lawful job-related reasons. Moreover, the CO found that the rebuttal failed to document that Employer clearly offered the job to Ms. Bailey at the prevailing wage of \$11.73 per hour or that Ms. Bailey refused the job. The CO found that Employer's statements to Ms. Bailey clouded the wage Employer would pay and served to discourage the applicant.

The CO concluded that Employer had failed to recruit U.S. workers in good faith and unlawfully rejected U.S. workers who applied.

Employer, by counsel, requested administrative-judicial review on March 22, 1994. Counsel filed a brief in support of appeal on November 1, 1994.

Discussion

The issues are whether Employer recruited U.S. workers in good faith and whether U.S. workers were rejected for other than lawful job-related reasons.

An employer must show that U. S. applicants were rejected solely for lawful job-related reasons. 20 CFR. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 CFR. § 656.20(c)(8). Therefore, an employer must take steps to ensure it that has lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. H.C. LaMarche Ente Inc., 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 CFR § 656.1.

Employer argues in its brief that the letters to applicants were mailed; that certified mailing is an authorized post office transaction and that a letter mailed is a letter received. Employer further argues that he accurately described what transpired between him and Ms. Bailey and that if there was a discrepancy in the CO's understanding of the facts, the CO should have issued a supplemental NOF and ordered Employer to interview Ms. Bailey again.

We disagree with Employer's suggestion that the CO misunderstands what was said between Employer and Ms. Bailey. The CO appears to have a firm grasp of the facts and to have correctly analyzed what transpired. Applicant Bailey appears to be qualified for the offered job on the basis of her resume. (AF. 42) Yet, she reports that she was told by Employer that the job pays \$8.00 per hour and that she felt that was not enough. (AF. 35, 51) Employer explains that Ms. Bailey misunderstood him, he was talking about wages he used to pay for this job, not the current prevailing wage of \$11.73 per hour. Previous wages have no relevancy to the current job and only confuse the recruitment process. Employer's response to Ms. Bailey's wage inquiry was vague and misleading. There is no apparent reason to understate the job's wages to a qualified applicant like Ms. Bailey unless Employer was not recruiting in good faith and wanted to discourage her from pursuing her application. In this instance, the confusion did discourage Ms. Bailey, who did not want to take this job at \$8.00 per hour. Moreover, Employer did not offer the job to Ms. Bailey or state lawful job-related reasons for rejecting her. (AF. 35)

We conclude that Employer did not recruit U.S. workers in good faith and that certification was properly denied. In view of this determination the other issue need not be discussed.

ORDER

The denial of labor certification is AFFIRMED.

Entered at the Direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.